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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Request for Review by	)	Docket Nos. 96-45 and 97-21
Unicom, Inc. of Decision of	)	
Universal Service Administrator	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

SUPPLEMENT TO PETITION FOR REVIEW

Unicom Inc., ("Unicom"), hereby supplements its Petition for Review so as to supply the attached memorandum dated January 17, 2001 from the Office of Legal Counsel, U.S. Department of Justice. The memorandum comprehensively addresses Native American preferences pursuant to Section 7(b) of the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450e(b), a central issue in Unicom's pending Petition for Review. Among other things, the memorandum concludes that Native American preferences are to be awarded not only when a statute expressly authorizes preferences (as does the ISDEAA itself, of course), but even in instances where a particular Act, e.g. the Telecommunications Act of 1996, or its implementing regulations do not specifically identify Indians as the intended beneficiaries. The Department further concludes that such preferences are not to be confined to programs administered by the Bureau of Indian Affairs. See e.g., pages 8-11. These conclusions are relevant and material to the Commission's consideration of the Native American preference issue raised by Unicom.

Accordingly, for the reasons stated by Unicom previously and herein, the Commission should hold that Native American preferences are properly awarded under the Rural Health Care program.

Respectfully submitted,

UNICOM, INC.

By: 

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April 22, 2002

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U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 17, 2001

MEMORANDUM FOR CHARLES RAWLS
GENERAL COUNSEL, DEPARTMENT OF AGRICULTURE

From: Randolph D. Moss
Assistant Attorney General

Re: Preferences Under Subsection 7(b) of the Indian Self-Determination and Education Assistance Act

This memorandum responds to your request for our opinion concerning the scope and character of the preferences mandated by subsection 7(b) of the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450e(b). You have asked two general questions, each of which calls for a number of subsidiary inquiries. First, to which Department of Agriculture programs does subsection 7(b) apply? We conclude that it applies to all grants or contracts made pursuant to statutes that identify Indian organizations as potential grant recipients or contractors, whether expressly or as specified in implementing regulations. We also conclude that it applies to contracts or grants for the benefit of Indians even when the authorizing statute and regulations do not expressly identify Indian organizations as potential recipients.[1] Second, you have asked about particular constitutional, statutory, or regulatory limitations on the character of the preferences that may be extended pursuant to subsection 7(b). We conclude that the Constitution would not preclude the types of preferences you suggest. We are aware of no regulatory restrictions, but we find that there are some statutory restrictions.

I. Background

The ISDEAA was enacted in 1975. *See* Pub. L. No. 93-638, 88 Stat. 2203 (1975). It seeks, among other things, "[t]o provide maximum Indian participation in the Government and education of the Indian people" and "to provide for the full participation of Indian tribes in the programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people." *Id.* The Act directs the Secretaries of

[1] Because the Act uses the term "Indian," in order to avoid any confusion we use that term as well rather than "Native American."

the Interior and of Health and Human Services, upon request by a tribe, to enter into contracts enabling the tribe or a tribal organization to take over planing and conducting programs the Secretaries had been carrying out for the benefit of the tribe. *See* 25 U.S.C. § 450f.

Subsection 7(b) of the Act provides:

> (b) Preference requirements for wages and grants
> Any contract, subcontract, grant, or subgrant pursuant to this subchapter, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible--
> (1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and
> (2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

25 U.S.C. § 450e(b).

The Act defines "Indian" to mean a member of "any Tribe, band, or nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." U.S.C. § 450b(d), (e).[2] The Act defines "Indian organization" as "the governing body of any Indian Tribe . . . or entity established or recognized by such governing body for the purpose of" the Indian Financing Act of 1974. 25 U.S.C. §§ 450e(b)(2), 1452(f); *see also* 48 C.F.R. 1452.226-70 (1998). (Organizations created or recognized under the Indian Financing Act are eligible for various forms of financial assistance for projects designed to promote economic development on Indian reservations. *See* 25 U.S.C. § 1452(f); 25 C.F.R. 101.2 (1999).) The ISDEAA defines "Indian-owned economic enterprise" as "any Indian-owned . . . commercial, industrial, or business activity established or organized for the purpose of profit: [p]rovided, that such Indian ownership shall constitute not less than 51 per centum of the enterprise." 25 U.S.C. §§ 450e(b), 1452(e); *see also* 48 C.F.R. 1452.226-70 (1998).

Your first question is which contracts and grants made by the Department of Agriculture

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[2] One state supreme court has held that this definition includes urban Indian organizations, nonprofit corporate bodies meeting certain criteria, *see* 42 C.F.R. 36.302(v), even though these organizations are not federally recognized tribes. *See Schmasow* v. *Native American Center*, 978 P.2d 304, 307-308 (Mont. 1999). You have not asked us about, and we do not address, this definitional issue.

("USDA") must include the training, employment, subcontracting, and subgranting preferences for Indians, Indian organizations, and Indian-owned economic organizations mandated by subsection 7(b). You describe four types of statutes and inquire whether subsection 7(b) applies to grants made pursuant to them. Letter from James S. Gilliland, General Counsel, Department of Agriculture, to Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of Section 7(b) of the Indian Self-Determination and Education Assistance Act* (Feb. 3, 1997) at 1-8 ("USDA Memo"). The four types of statutes are those that 1) expressly provide that Indians or Indian organizations are the sole eligible recipients of federal assistance; 2) expressly provide that Indians or Indian organizations are one among several categories of eligible recipients or expressly provide that the financial assistance is for the benefit of Indians; 3) do not expressly provide that Indians or Indian organizations are among the eligible recipients but the implementing regulations do expressly identify Indians or Indian organizations as eligible recipients; and 4) do not expressly provide and do not have implementing regulations that expressly provide that Indians or Indian organizations are among the eligible recipients, and do not expressly provide and do not have implementing regulations that expressly provide that Indians are intended beneficiaries, but support activities that will in fact principally benefit Indians. *Id.* at 3-8.

Your second question is what are the constitutional, statutory, and regulatory limitations on the types of preferences USDA may require under subsection 7(b).[3]

II. Discussion

A. Scope

Subsection 7(b) requires federal agencies to include training, employment, and subgranting preferences for Indians, Indian organizations, and Indian-owned economic enterprises in "[a]ny contract, subcontract, grant, or subgrant pursuant to" the ISDEAA, the Johnson-O'Malley Act, "or *any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians.*" 25 U.S.C. §450e(b) (emphasis added). Subsection 7(b) thus requires the inclusion of preferences in contracts and grants made pursuant to statutes

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[3] We solicited and ultimately received the views of the Department of the Interior, which is the department principally responsible for administration of the ISDEAA, about some of the questions you posed. *See* Memorandum from John D. Leshy, Solicitor, Department of the Interior, to Jo[nathan] Cedarbaum, Attorney-Advisor, Office of Legal Counsel, *Re: Indian Preference Under Section 7(b) of the Indian Self-Determination and Education Assistance Act* (June 30, 2000) ("Interior Memo"); We also solicited and received the views of the Office of Tribal Justice here in the Justice Department. Memorandum from Mark Van Norman, Office of Tribal Justice, to Karen Stevens, Attorney-Advisor, Office of Legal Counsel, *Re: Indian Preference Under Section 7(b) of the Indian Self-Determination and Education Assistance Act* (Oct. 1, 1997) ("OTJ Memo").

that fall into either of two classes: those that authorize contracts with or grants to Indian organizations and those that authorize contracts or grants for the benefit of Indians regardless of whether the contractors or the grants' recipients themselves are Indian organizations.

The size of each of those classes turns in large measure on the meaning of the phrase "any other Act authorizing." Interpreted in light of the two statutes mentioned earlier in the same sentence, that phrase might be understood as limited to laws that, like the ISDEAA and the Johnson-O'Malley Act, are targeted at assisting Indians exclusively, that is, laws included in the first of your four categories.[4] Your department has previously rejected such a narrow reading, *see* USDA Memo at 3,[5] and the only court of appeals to address the issue has, at least by implication, similarly concluded that subsection 7(b) applies to grants and contracts under a broader range of statutes, specifically under statutes that identify Indian tribes or tribal organizations as one among several classes of eligible recipients. *See Alaska Chapter, Associated General Contractors of America, Inc.* v. *Pierce*, 694 F.2d 1162, 1165 (9th Cir. 1982) (grants for low-income housing). We agree that subsection 7(b) applies not only to statutes that identify Indian organizations as the sole eligible grant recipients or Indians as the sole beneficiaries but also to statutes that identify Indian organizations as one among several classes of possible recipients or Indians as one among several groups of beneficiaries. By its plain terms, subsection 7(b) extends to "any" statute authorizing grants to Indian organizations or for the benefit of Indians regardless of whether the statute also authorizes grants to non-Indian organizations or benefits non-Indians. It seems fair to assume that if Congress had intended to restrict subsection 7(b) to statutes aimed exclusively at Indian organizations or Indian beneficiaries, it would have said so rather than using the expansive term "any." *See, e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 57 (1997) (the word "any" suggests Congress intended the related phrase to be as inclusive as possible).

The more difficult cases are statutes, such as those in your third and fourth groupings, that do not expressly identify Indian organizations as recipients or Indians as beneficiaries.

The third group are statutes that do not expressly provide that Indian organizations are among the groups eligible to receive contracts or grants or that the statute is intended to benefit Indians but whose implementing regulations interpret their definitions of eligible entities as including Indian organizations or tribes. As examples of statutory provisions in this group you

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[4] The Johnson-O'Malley Act authorizes the Secretary of the Interior to enter into contracts with state, territorial, or local governments and with public and private corporations, agencies, and institutions to provide educational, medical, agricultural, and social welfare assistance to "Indians." *See* 25 U.S.C. § 452. As originally passed, the Act only authorized contracts with state or territorial governments. *See* Act of Apr. 16, 1934, ch. 147, 48 Stat. 596.

[5] The Interior Department and OTJ agree with this conclusion as well. *See* Interior Memo at 3-4; OTJ Memo at 2, 4-8.

offer §§ 306(a)(11), 306a, and 312(c) of the Consolidated Farm and Rural Development Act, as amended, codified at 7 U.S.C. §§ 1926(a)(11), 1926a & 1932(c). Section 306(a)(11), for example, authorizes the Secretary of Agriculture to make "rural business opportunity grants" to "public bodies, private nonprofit community development corporations or entities, or such other agencies as the Secretary may select." 7 U.S.C. § 1926(a)(11) (1994 & Supp. 1996). The regulations promulgated under that provision include among eligible recipients "Indian tribes on Federal or State reservations and other Federally recognized tribal groups." 7 C.F.R. § 4284.620 (2000); 64 Fed. Reg. 71984, 71986 (Dec. 23, 1999). Section 306a authorizes the Secretary to give emergency community water assistance grants to "public or private nonprofit entit[ies]" that meet certain geographic and demographic requirements. 7 U.S.C. § 1926a(a), (c)(1), (e)(1). The regulations carrying that law into effect include among the eligible "public entities" "Indian tribes on Federal and State reservations and other Federally recognized Indian Tribal groups in rural areas." 7 C.F.R. § 1778.6 (1999). Section 312(c) authorizes "rural business opportunity grants" for "public bodies and private nonprofit corporations." 7 U.S.C. 1932(c). The implementing regulations similarly define "public bodies" to include "Indian tribes on Federal and State reservations and other Federally recognized Indian Tribal groups in rural areas. 7 C.F.R. § 1942.305 (1999).

Statutes in your fourth group are those that do not expressly provide that Indian organizations are among the groups eligible to receive contracts or grants or that the statute is intended to benefit Indians and whose implementing regulations also do not so provide but which authorize grants that in some cases principally benefit Indians (often by supporting work performed on Indian reservations). One of your examples of statutes in this group is the grant program carried out by the Federal Extension Service under section 3(d) of the Smith-Lever Act, 7 U.S.C. 343(d). That statute authorizes the Secretary of Agriculture to expend certain sums for "administration, technical, and other services and for coordinating the extension work of the Department and the several States, Territories, and possessions." The statute has no implementing regulations. Relying on its general language, the Secretary has made many grants to state extension services for programs to benefit Indians in the areas of food safety and water quality. For example, a number of grants have gone to support educational programs at tribal colleges and popular educational efforts on reservations aimed at promoting safe handling of food. A second example you give of statutes in this group is the community food projects competitive grants program authorized under the Food Stamp Act, 7 U.S.C. 2034. That statute, which makes no mention of Indians, authorizes the Secretary to make grants to "private nonprofit entities" that meet certain criteria.[6] The statute has no implementing regulations, but the

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[6] To be eligible for a grant under subsection (b) of this section, a private nonprofit entity must--

(1) have experience in the area of--

(A) community food work, particularly concerning small and medium-sized farms, including the provision of food to people in low-income communities and the development of new markets in low-income communities for agricultural producers; or

Secretary has made a numbers of grants under it to organizations promoting agricultural production on reservations. For example, in 1998 the Secretary gave a grant to Little Big Horn College for the Crow Community Garden Project, which encourages families to develop produce gardens and greenhouses and trains Crow reservation residents in agricultural techniques.

Although the issue is not free from doubt, we believe that grants or contracts made under these statutes are covered by subsection 7(b) so long as the particular grants or contracts are for the benefit of Indians because of their status as Indians. First, we explain how we reach this conclusion. Then we offer a little fuller explanation of the phrase "for the benefit of Indians because of their status as Indians."

We believe the text of subsection 7(b) is not sufficiently clear to resolve the matter, although the statutory language tips somewhat in favor of the view that subsection 7(b) covers each of the four categories you have identified. Considering only subsection 7(b)'s provision that the "Act" at issue must be one "authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians," one might conclude that the authorization must be explicit. On this view, only an explicit reference to Indian organizations or Indians in the terms of the authorizing statute would provide the formal approval necessary to constitute authorization. We think, however, that both dictionary definitions and common usage recognize that authorization may be indirect or implicit as well. According to the dictionaries, to authorize means "to clothe with authority or legal power; to give a right to act . . . to give authoritative permission to or to empower"; "to give authority for; formally sanction"; "to give formal approval to; to sanction, approve, countenance."[7] *Cf. e.g.*, *Ralston* v. *Robinson*, 454 U.S. 201, 213 (1981) (concluding that despite lack of express approval statute "implicitly authorizes" particular judicial determination). If an agency may lawfully provide contracts or grants to, or for the benefit of, Indians, one would ordinarily conclude that the agency was "authorized" to do so, whether the relevant "authorizing" statute made express reference to Indians or not.

The original legislative history of the ISDEAA provides little additional interpretive assistance. Section 7 was not included in the Senate version of the bill that became the ISDEAA. *See* S. Rep. No. 93-682 (Feb. 7, 1974); S. Rep. No. 93-762 (Mar. 28, 1974). It was added to the

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(B) job training and business development activities for food-related activities in low-income communities;
(2) demonstrate competency to implement a project, provide fiscal accountability, collect data, and prepare reports and other necessary documentation; and (3) demonstrate a willingness to share information with researchers, practitioners, and other interested parties.

[7] Webster's New International Dictionary of the English Language 186 (2d ed. 1935); Random House Dictionary of the English Language 100 (2d ed. 1971); 1 The Oxford English Dictionary 798 (2d ed. 1989).

bill by the House Committee on Interior and Insular Affairs, apparently in response to a recommendation from the Interior Department. *See* H.R. Rep. No. 93-1600, at 15, 21 (Dec. 16, 1974). The section-by-section analysis in that committee's report describes subsection 7(b) in considerably narrower terms than the subsection's plain language appears to cover. The report explains that subsection 7(b) "gives a preference to Indians in training and employment in the administration of contracts and grants *under the Act* and to Indian organizations and Indian-owned economic enterprises in subgrants and subcontracts." *Id.* at 15 (emphasis added).[8]

Nor does the subsequent legislative history supply much guidance, though it might be read to offer some indirect support for including in subsection 7(b)'s reach statutes that are not limited to Indians and statutes that may not be express in their identification of Indian beneficiaries. The ISDEAA has been amended several times, but the language in subsection 7(b) has remained unaffected. The most significant revisions of the Act took place in 1988 and 1994. The 1988 amendments made clear that the directive to the Secretary of the Interior to enter into self-determination contracts covered "*programs* . . . administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior" and programs "for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed." Pub. L. No. 100-472, 102 Stat. 2285, 2288 (1988) (emphasis added). The statute does not otherwise define the term "programs" nor does it otherwise restrict the universe of covered statutes. Thus with respect to self-determination contracts, Congress apparently intended to include programs for the benefit of Indians regardless of whether the statutes authorizing the programs were limited to Indians and perhaps even regardless of whether the statutes expressly identified Indians as beneficiaries.[9]

Because neither the text nor legislative history of the ISDEAA conclusively resolves the issue, we turn now to two additional considerations: the purpose of the ISDEAA and

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[8] In describing the development of the policy of self-determination, the report refers to four earlier acts targeted at promoting Indian education and economic enterprise that had, at least since the 1960s, been used to promote Indian self-determination: the Buy Indian Act of 1910, the Johnson-O'Malley Act of 1934, the Snyder Act of 1921, and a provision in the 1834 Act providing for the organization of a department of Indian affairs that mandated a preference for "persons of Indian descent" in the hiring of interpreters, teachers, and "other persons employed for the benefit of the Indians" and permitted tribal supervision of such federally hired personnel. *Id.* at 20.

[9] The 1994 Amendments re-shaped the contents of self-determination contracts in a number of important respects, but, apart from the addition of subsection 7(c) discussed below, shed no further light on the scope of subsection 7(b). *See* Pub. L. No. 103-413, 108 Stat. 4250 (1994).

congressional acquiescence in the face of longstanding administrative practice applying subsection 7(b) in these circumstances.

One of the central goals of the ISDEAA is to promote Indian self-government through strengthening the administrative capacities of tribes and tribal organizations. Preferences for Indians in training and employment connected to the administration of federal grants to or contracts with tribes and tribal organizations and in grants and contracts for the benefit of Indians help foster the administrative capacities of tribes by enabling their members to gain the experience and develop the expertise necessary to handle projects and run institutions previously overseen by federal officials and staffed with federal employees. The benefits are just as great whether the grant or contract in question is made pursuant to an act making express reference to Indians or to one that provides a more general authority that is then applied to benefit Indians. Thus we believe the central purpose of the ISDEAA is served by reading subsection 7(b) as applicable to grants and contracts made pursuant to statutes in your third and fourth categories whenever those grants and contracts are for the benefit of Indians because of their status as Indians.

This approach apparently comports with longstanding administrative practice, practice Congress has left undisturbed even as it has amended the ISDEAA on several occasions. The Interior Department, the agency principally responsible for administering the ISDEAA, has issued regulations implementing subsection 7(b). Those regulations provide that subsection 7(b) preferences must be included in any contract awarded by the Bureau of Indian Affairs (BIA), all those outside the BIA "when the contract is entered into pursuant to an act specifically authorizing contracts with Indian organizations," and all those "where the work to be performed is specifically for the benefit of Indians and is in addition to any incidental benefits which might otherwise accrue to the general public." 48 C.F.R. § 1426.7003 (1999); *see also* 48 C.F.R. § 1452.226-70 (1999). The Department of Health and Human Services, the second department with primary responsibility for implementation of the ISDEAA, has promulgated regulations governing the application of subsection 7(b) preferences that use identical language. *See* 48 C.F.R. § 370.202(a) (1999).[10]

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[10] A number of other departments and agencies have adopted regulations concerning subsection 7(b) preferences.

The Environmental Protection Agency requires subsection 7(b) preferences for recipients of grants under cooperative agreements for toxic waste cleanup authorized by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See 42 U.S.C. § 9604(d). Indian tribes are identified in the statute as being among the potential recipients of these grants, but the regulations are not limited to Indian tribe recipients. The regulations require all recipients, in their procurement activities, to "comply with the Indian Self-Determination and Education Assistance Act . . . [i]f the project benefits Indians." 40 C.F.R. § 35.6555.

The Department of Housing and Urban Development requires subsection 7(b) preferences in two grant programs, one under a statute targeted exclusively for the benefit of Indians, *see* 25

We understand these regulations as efforts to interpret the scope of subsection 7(b) in accord with the central purpose of the ISDEAA we described above: creating practical foundations for tribal self-determination by increasing economic opportunities – and thus promoting a variety of job skills, including managerial and administrative abilities – among Indians in connection with projects that benefit Indian communities. The defining characteristic of each of the three groups of contracts serves to identify contracts awarded for the benefit of Indians because of their status as Indians. Given the BIA's role as the lead federal agency assisting Indians, contracts awarded by the BIA virtually by definition are awarded for the benefit of Indians in this sense. Acts "specifically authorizing contracts with Indian organizations" fall within the scope of subsection 7(b) on even the most restrictive reading of its literal terms, and moreover are highly likely to be ones in which Congress intended to authorize contracts for the benefit of Indians because of their status as Indians. The ISDEAA's definition of "Indian organization" ensures that the contractor is tied to tribal life and is likely to be devoted to economic development on a reservation. Finally, contracts "where the work to be performed is specifically for the benefit of Indians and is in addition to any incidental benefits which might otherwise accrue to the general public" are ones where, to some degree, the contract is intended to benefit Indians because of their status as Indians. Thus, these contracts too are ones aimed at promoting the well-being of Indian communities.

Interior Department regulations applying subsection 7(b) to contracts under statutes in these three groups have been on the books at least since 1979. *See* 44 Fed. Reg. 6250 (Oct. 31,

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U.S.C. § 4112(d) (Indian Housing Block Grants for tribes or "tribally designated tribal housing entit[ies]"); 24 C.F.R. §§ 1000.48-1000.54, and one under a general statute with a particular provision expressly setting aside a portion of the overall pool of grant money exclusively for Indian tribes, *see* 42 U.S.C. § 5306(a)(2) (Community Development Block Grants' tribal allocation); 24 C.F.R. § 1003.510.

The Department of Transportation has established Indian preferences in certain grants made under the Federal Highway Act, 23 U.S.C. §101 *et seq*, for construction, maintenance, or repair of Indian reservation roads. *See* 23 C.F.R. 635.117(e) (2000); Federal Highway Administration, Office of Civil Rights, Indian Task Force Report 2-4 (Feb. 4, 1998). Among other things, the Act authorizes grants for the construction and maintenance of federal lands highways, that is, highways on or giving access to lands under federal jurisdiction. *See* 23 U.S.C. § 204. Indian reservation roads, that is, public roads that are located in or provide access to Indian reservations or Indian trust land, restricted Indian land, or Alaska Native villages, *see* 23 U.S.C. § 101, are a one type of federal lands highways, *see* 23 U.S.C. § 204. The Act also authorizes funds for bridge replacement and rehabilitation, specifically identifying bridges on Indian reservation roads as among the categories of eligible bridges. See 25 U.S.C. § 144(c)(3). In addition, the Act authorizes emergency relief for repair or reconstruction of roads that have suffered serious damage from natural or man-made catastrophes. *See* 25 U.S.C. § 125. Among the classes of roads identified as eligible are Indian reservation roads. *See* 25 U.S.C. § 125(a), (e).

1979). Since 1979, Congress has amended the ISDEAA at least four times, but has left the Interior Department's three-part description of the scope of subsection 7(b) undisturbed. Moreover, as discussed more fully below, in 1994, Congress focused specifically on clarifying the meaning of subsection 7(b) vis a vis tribal employment rights ordinances, adding a subsection 7(c) but again leaving Interior's three-part categorization of subsection 7(b)'s reach unchanged. Although the significance of congressional acquiescence in the face of longstanding administrative practice must be assessed carefully, we think this pattern of acquiescence despite repeated revisitings of the statute indicates congressional support for the reasonableness of Interior's approach. *See, e.g., Haig* v. *Agee*, 453 U.S. 280, 300 (1981); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974).

We think it worth emphasizing that while our interpretation of subsection 7(b) rests principally on statutory purpose and congressional acquiescence in administrative practice, it is perfectly consistent with the text of subsection 7(b). If grants or contracts are for the benefit of Indians and they are authorized pursuant to a particular statute, then that statute necessarily is one "authorizing Federal contracts . . . or grants . . . for the benefit of Indians."[11]

We have used the phrase "for the benefit of Indians because of their status as Indians" as a way of capturing the same notion that we understand the third part of the Department of the Interior's regulations to be describing in their reference to work "specifically for the benefit of Indians" that is "in addition to any incidental benefits that might otherwise accrue to the general

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[11] With regard to statutes in your third group, those whose implementing regulations expressly identify Indian organizations as potential recipients of grants or contracts, two additional considerations support the applicability of subsection 7(b). First, the express identification of Indian organizations as potential recipients of federal grants or contracts constitutes an additional piece of evidence that the contracts or grants are for the benefit of Indians because of their status as Indians. Second, if a statute does not expressly identify Indian tribes or organizations as potential recipients but the regulations implementing the statute reasonably determine that tribes or tribal organizations are among those eligible, the statute's silence may fairly be seen as an ambiguity that the administering agency has clarified. By reasonably determining that Indian tribes or tribal organizations are among those eligible, the administering agency has in effect concluded that the statute is one which authorizes grants to Indian tribes or tribal organizations. Under the principles of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), that interpretation is entitled to deference. If, as in one of the examples you give, Congress defines the class of eligible recipients in part as "such other agencies as the Secretary may select," 7 U.S.C. § 1926(a)(11) (1994 & Supp. 1996), it has given "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *id.* at 844. If it has simply used a general, undefined phrase, such as "public or nonprofit entities," the delegation of interpretative authority to the administering agency is implicit but the agency's interpretative choices are still entitled to deference. *Id.* At 843-45.

public." That is, the contract must not just benefit Indians incidentally. It must be intended to benefit Indians at least in part because of their Indian identity.[12] The examples you give of contracts made pursuant to statutes in your third and fourth classes all appear to fit this description.

B. Character of Preferences

You ask several questions about possible constitutional, statutory, or regulatory limits on the nature of the preferences the Agriculture Department may impose under subsection 7(b).

1. TEROs

Your first question is whether USDA may incorporate a tribe's tribal employment rights ordinance ("TERO") in a grant agreement in fulfilment of subsection 7(b)'s mandate. As you inform us, TEROs vary from tribe to tribe, but they all mandate preferences in employment or training for tribal members and often for members of other tribes as well.

As you note, your question raises several distinct issues. First, may USDA impose tribe-specific preferences on grant recipients (or allow recipients to use tribe-specific preferences in fulfillment of their subsection 7(b) obligations)? We think it may not, unless the grant is one undertaken pursuant to the ISDEAA itself.

First, subsection 7(b) itself speaks of preferences for "Indians," "Indian organizations," and "Indian-owned economic organizations," not for members of the tribe that is the principal beneficiary of the grant or contract. None of the statutory definitions of those terms is cast in tribe-specific language. *See supra* p. 2.

Second, in 1994, Congress added a provision to § 7 of the ISDEAA specifically providing that in self-determination contracts, that is, contracts entered into by the Secretary of the Interior or the Secretary of Health and Human Services under the ISDEAA itself, "intended to benefit one tribe," "the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract." 25 U.S.C. § 450e(c); *see* Pub. L. No. 104-413, § 102, 108 Stat. 4250, 4251 (1994).[13] The new

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[12] This reading perhaps draws some support as well from the 1988 amendments to the ISDEAA, which use the phrase "for the benefit of Indians because of their status as Indians" in a separate portion of the Act. *See supra* p. 7.

[13] The full text of subsection 7(c) is: "Notwithstanding subsections (a) and (b) of this section, with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of

subsection 7(c) begins, "Notwithstanding subsections (a) and (b)," and the House report confirms that Congress understood the permission of tribe-specific preferences in subsection 7(c) as an innovation rather than as a mere clarification of subsection 7(b). The report explains that subsection 7(c) was intended

> . . . to recognize tribal laws addressing employment preferences. Presently, tribal governments are unable to reconcile the terms of tribal employment rights ordinances (TERO) (which generally provide for tribal preferences in employment for tribal members) with *section 7(b) of the Act (which establishes a general Indian preference).* Presently, the Bureau of Indian Affairs and the Indian Health Service disagree on the applicability of tribal TERO ordinances to employment under a self-determination contract. The new amendment will remove the source of conflict by endorsing tribal TERO ordinances where they are in place.

140 Cong. Rec. H11142 (Daily ed. Oct. 6, 1994) (emphasis added); see also S. Rep. No. 102-444, at 6 (Sept. 29, 1992). Congress did not add a similar provision for contacts or grants authorized by statutes other than the ISDEAA.

In light of Congress's resolution of the precise issue you raise with respect to self-determination contracts and its failure to extend that resolution to contracts or grants entered into pursuant to statutes other than the ISDEAA, we conclude that subsection 7(b) mandates general Indian preferences for contracts and grants made pursuant to statutes other than the ISDEAA.[14]

You also ask specifically whether the USDA may include as part of the preference a requirement that the contractor pay a specified percentage of the contract payment or grant to the tribe for the purpose of supporting tribal administration of the TERO. Again, because we conclude that USDA may not require compliance with TEROs -- at least to the extent that they mandate tribe-specific preferences -- in contracts or grants made pursuant to statutes other than the ISDEAA itself, we believe USDA may not require payments for TERO administration unless the contract or grant is entered into under the ISDEAA itself.

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the contract." 25 U.S.C. § 450e(c).

[14] We recognize that contractors or grant recipients may on some occasions face conflicting preference requirements under subsection 7(b) and a TERO. We would note, however, that in many cases the practical effect of a general Indian preference under subsection 7(b) will be the same as that of a tribe-specific TERO because the Indians who benefit from the subsection 7(b) preference will be largely, if not exclusively, members of the tribe whose TERO would otherwise govern the operations of the contractor or grant recipient.

2. Extent and character of preferences

Your next question is about the permissibility of various forms and levels of preference for Indians, Indian organizations, and Indian-owned economic organizations. You ask whether USDA may require contractors to employ a particular percentage of Indians overall or in certain positions. You ask whether USDA may require a contractor to establish or pay for a training program for its Indian employees working on the project supported by the grant. You ask whether USDA may establish an absolute requirement of subgranting or subcontracting to Indian-owned economic enterprises. Apart from the question of tribe-specific versus general Indian preferences considered above, we can offer only general guidance.

Under the Constitution, the preference must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). We are unaware of any decisions that have judged particular variations in Indian economic preferences of the sort you describe against that standard, but the standard is not a demanding one. We believe that each of the variants you describe might reasonably be defended as meeting that standard.

The only limit contained in the ISDEAA itself on the character of the preferences mandated by subsection 7(b) is that they be given "to the greatest extent feasible." Both the courts and the Comptroller General have interpreted that phrase as conferring on agency officials broad discretion in determining the stringency of the preference and the extent to which other conditions will serve as prerequisites for the granting of a subcontract. *See, e.g., Ramirez, Leal & Co.* v. *City Demonstration Agency*, 549 F.2d 156, 156 (9th Cir. 1977) ("The flexible language 'to the greatest extent feasible' gives broad discretion to the officials charged with the responsibility of awarding contracts. Unless the facts clearly show these officials failed to apply a required standard or were clearly erroneous in determining feasibility, courts are prohibited from disturbing their decisions."); *Johnson*, 645 P.2d at 428; *Matter of: Association of Village Council Presidents*, 1983 WL 27240 (Comp. Gen.) (July 26, 1983); *Matter of: J & A, Inc.*, 59 Comp. Gen. 739 (Sept. 22, 1980); *In the Matter of: Department of the Interior– Request for Advance Decision*, 58 Comp. Gen. 160 (Dec. 22, 1978). Again, the limitation is not a demanding one, though USDA would be restricted by the requirement of feasibility, that is, the requirement that the preferences must not make it impossible to carry out the grant or contract.

You also ask whether the degree of preferences required by USDA must be established by regulation. A number of departments and agencies have provided for subsection 7(b) preferences by regulation, some simply by reference to the ISDEAA, *see, e.g.*, 40 C.F.R. § 35.6555 (1999) (cooperative agreements for toxic waste cleanups), and some in more detailed terms, *see, e.g.*, 24 C.F.R. § 1003.510 (1999) (Community Development Block Grants for tribes). If a program that USDA determines is covered by subsection 7(b) has implementing regulations, it may be helpful for eligible entities for USDA to include at least the general language of subsection 7(b) in the regulations, but we are unaware of any legal requirement that it do so. In

order to ensure fair competition for contracts or grants, USDA must include the terms of the required preferences in any notice soliciting bids or proposals.

3. Relationship to Regulation Concerning Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments

Your final question is whether the USDA regulation establishing uniform administrative requirements for grants and cooperative agreements with state, local, and tribal governments, 7 C.F.R. pt. 3016, restricts the types of preferences that can be required under subsection 7(b).

We think the answer is clearly, "No." To the extent that subsection 7(b) and the regulation are in conflict, subsection 7(b) controls. The regulation itself makes this plain. By its own terms, it applies "to all grants and subgrants to governments, *except where inconsistent with Federal statutes* or with regulations authorized in accordance with the exception provision of § 3016.6 . . . ." 7 C.F.R. 3016.4(a); *see also* 53 Fed. Reg. 8034, 8077 (Mar. 11, 1988) (discussion in EPA section of agency-wide rule explaining that no explicit exception for Indian preferences needed because agency-wide rule includes exception for inconsistent federal statutes); 59 Fed. Reg. 52224, 52224 (Oct. 14, 1994) (OMB Circular A-102: "If the enabling legislation for a specific grant program prescribes policies or requirements that differ from those in this Circular, the provisions of the enabling legislation shall govern").[15]

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[15] You also raise a particular question about a section of the regulation concerning geographic preferences. *See* 7 C.F.R. 3016.36(c)(2). You are concerned that this provision's explicit exception of federally mandated or encouraged *geographic* preferences from the regulation's general mandate for free and open competition in procurement contracts, *see* 7 C.F.R. 3016.36(c)(1), implies that other types of preferences, including subsection 7(b) preferences, are not allowed. We doubt that such an implication was intended, but even if it were, the general exception for conflicting federal statutes, included in the portion of the regulation defining its overall applicability, *see* 7 C.F.R. 3016.4(a), ensures that the regulation creates no obstacles to implementation of subsection 7(b) preferences.

CERTIFICATE OF SERVICE

I, Yvette Morgan, hereby certify that the foregoing "Supplement to Petition for Review" was served this 22nd day of April, 2002, by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

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